STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2007
v	No. 271102 Cass Circuit Court
TONY LEE BROWN, Defendant-Appellant.	LC No. 05-010314-FH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); felonious assault, 750.82; and willfully preventing a telephone communication, 750.540. He was sentenced to 99 months to 20 years' imprisonment for his first-degree home invasion conviction, 14 to 48 months' imprisonment for his felonious assault conviction, and 111 days' imprisonment for his willfully preventing a telephone communication conviction. Defendant appeals by leave granted. We affirm.

During the early morning hours of August 13, 2005, the victim was making some preparations for a family reunion on the following day. When defendant appeared in the victim's living room, she ordered him out of her residence.[1] Defendant refused, insisting that the victim speak with him. The victim offered to join defendant outside, because she did not want to have a dispute in front of her houseguests. After leaving the residence with defendant, the victim reentered the residence and closed and locked the door. Upon being locked out, defendant started pounding on the front door. Both the victim and her son saw the door being forcibly opened. Defendant thereafter returned inside.

[1] Defendant and the primary victim formerly had a dating relationship, and they previously resided together in Cassopolis, Michigan, and Elkhart, Indiana. Defendant was not an expected guest on this occasion. Defendant appeared at the victim's residence a few hours after her adult son, her son's father, and another person arrived. The victim's brother was also expected. At trial, there was testimony that defendant was invited into the residence by one of the victim's guests, who had mistaken defendant for the victim's brother.

The victim retreated to her bedroom to retrieve her cellular telephone, while ordering defendant out of the residence. He refused to leave and a melee ensued. The victim called 911, but defendant forced the cellular telephone from her hand, and it fell between her bed and a table. During the scuffle, defendant yelled "you're not goin' call 911 on me . . . I'm not going to jail." During the altercation, defendant brandished an empty tequila bottle as a weapon, and the victim feared that he would strike her with it. Meanwhile, the victim's son observed the escalating argument from the living room. When it appeared that defendant was going to hit the victim with the bottle, the son intervened. He grabbed the bottle from defendant, who then turned around and pulled on a chain around the son's neck. The son punched defendant and then placed the bottle outside on the porch. At that point, a 911 dispatcher called the victim's cellular telephone to reconnect her call. After seeing that the victim completed the 911 call, defendant grabbed the cellular telephone and fled from the residence.

The police arrived at approximately 4:00 a.m. During and after the police investigation, other individuals arrived at the victim's residence, including her brother. After the police left, defendant returned to the victim's residence, but her brother intercepted defendant and drove him to his cousin's house. However, defendant returned to the victim's residence a third time, again forcing his way into the residence and then entering the victim's bedroom. Thereafter, the police responded and apprehended defendant at approximately 6:45 a.m. The instant action involves the charges arising from the first of defendant's forced entries into the victim's residence.

Defendant argues that the verdict for first-degree home invasion was against the great weight of the evidence. We disagree. This Court reviews a trial court's factual findings for clear error, giving regard to the trial court's special opportunity to judge the credibility of witnesses. MCR 2.613(C). Absent exceptional circumstances, issues of credibility should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

First-degree home invasion consists of the following elements: (1) a breaking and entering of a dwelling or an entering of a dwelling without permission by the defendant; (2) an intent by the defendant to commit a felony, larceny, or assault in the dwelling or the actual commission by the defendant of a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) the lawful presence of another person in the dwelling or the fact that the defendant was armed with a dangerous weapon. MCL 750.110a(2). Felonious assault has the following elements: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Intent may be established by reasonable inferences drawn from the defendant's conduct and surrounding circumstances. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

The record demonstrated that the prosecution proved all of the elements of first-degree home invasion beyond a reasonable doubt. The testimony of the victim and her son was corroborated by the police witnesses' observations and photographic evidence that defendant broke into the victim's residence. The victim's son heard a loud sound, saw the door open, and saw defendant appear in the residence. Next, the testimony of the victim and her son

demonstrated that defendant threatened the victim verbally as well as with a glass tequila bottle, which is a dangerous weapon capable of inflicting very serious bodily harm, and the evidence demonstrates that he did so with the intent to place her in reasonable apprehension of immediate battery.[2] Finally, the victim was lawfully present in her residence.

On appeal, defendant implies that he did not have the requisite intent to commit an assault. However, defendant concedes that the trial court had a factual basis for finding him guilty of felonious assault, but he states that it was "only in the most technical sense," and he argues that "the sentence should reflect this lower level of culpability." This unsupported, self-serving argument does not establish that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). On this record, we conclude that the verdict was not against the great weight of the evidence. The trial court found that the testimony of the victim, the victim's son, and the police witnesses was credible, while the testimony of defendant and defendant's brother was not credible. "Criminal cases are usually fought on the battlefield of witness credibility." *Lemmon*, *supra* at 643 n 22. Any question of credibility was properly left to the trial court. See *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Next defendant challenges the sufficiency of the evidence presented at trial on the charge of willfully preventing a telephone communication. Defendant argues that his conduct was not within the scope of the statute. In reviewing a sufficiency of the evidence challenge in a bench trial, we review the evidence "de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). "All conflicts with regard to the evidence must be resolved in favor of the prosecution." *Id.* "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *Id.* This Court reviews de novo underlying questions of law related to statutory interpretation. *People v Bobek*, 217 Mich App 524, 528; 553 NW2d 18 (1996). When statutory language is not specifically defined, this Court may look to dictionary definitions for guidance. *People v Tracy*, 186 Mich App 171, 176; 463 NW2d 457 (1990).

MCL 750.540 provided[3] in pertinent part:

> Any person . . . who shall wilfully and maliciously prevent, obstruct or delay by any means or contrivance whatsoever the sending, conveyance or delivery, in this state, of any authorized communication . . . by or through any telegraph or telephone line, cable or wire under the control of any telegraph or telephone company doing business in this state . . . shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars.

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[2] We note that defendant does not contest the proof of any of the specific elements of felonious assault.

[3] MCL 750.540 was amended in 2006. However, defendant was charged with violating this offense before the amendment date. Thus, the previous version of the statute is discussed herein.

Defendant argues that his conduct was not proscribed by the statute. Specifically, defendant asserts that "the words 'means' and 'contrivance' do not include the conduct of [defendant] in this case."

Defendant's argument lacks merit. The statute prohibits an individual from willfully or maliciously preventing, obstructing or delaying a telephone communication "by any means or contrivance whatsoever." In *People v Hotrum*, 244 Mich App 189, 190; 624 NW2d 469 (2000), the defendant was charged with violating MCL 750.540 after he "ripped the telephone cord out of the wall, rendering the telephone inoperable and preventing the complainant from telephoning the police." This Court held:

> [T]he statute does not seek to punish a person for physical damage to telephone equipment or lines. Rather, the provision under which defendant was charged seeks to punish interference with "the sending, conveyance or delivery" of telephone and telegraph communications, which is exactly what defendant accomplished by pulling the telephone line out of the wall when his wife attempted to call the police. [*Hotrum*, *supra* at 194 (footnote omitted).]

Under the circumstances, the plain meaning of "means" is "an agency, instrument, or method used to attain an end." *Random House Webster's College Dictionary* (1997). In *Hotrum*, *supra* at 194, the method of preventing the telephone communication was the defendant's ripping the telephone cord out from the wall. In the instant case, defendant's method was knocking the cellular telephone from the victim's hand and then struggling with her to prevent her from retrieving the cellular telephone.

Further defendant's assertion that former MCL 750.540 does not cover cellular telephones lacks merit. The plain meaning of the statute does not support defendant's narrow definition of telephone. "Telephone" is defined as "an apparatus, system, or process for transmission of sound or speech to a distant point . . . ." *Random House Webster's College Dictionary* (1997). Clearly, a cellular telephone is included in that definition. Further, a "line" is defined as "a telephone connection . . . ." *Id.* Thus, the fact that a cellular telephone is not affixed to an actual, physical line does not exclude it from the purview of former MCL 750.540.

In this case, the victim's testimony demonstrated that defendant willfully and maliciously prevented, obstructed, and delayed her 911 call, by knocking the cellular telephone from her hand and then physically preventing her from retrieving the cellular telephone. Further, defendant's admission ("you're not goin' call 911 on me") demonstrated that, by virtue of his actions, he interfered with "the sending, conveyance or delivery" of a telephone communication. *Hotrum*, *supra* at 194. On this record, viewing the evidence in the light most favorable to the prosecution, we conclude that the trial court correctly found that the essential elements of the crime were proven beyond a reasonable doubt. *Wilkens*, *supra* at 738.

Defendant also contends on appeal that the trial court scored offense variable (OV) 10, MCL 777.40; OV 13, MCL 777.43; and prior record variable (PRV) 7, MCL 777.57, incorrectly. We disagree. This Court reviews issues concerning the proper scoring of sentencing guidelines variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and

principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The trial court's factual findings associated with its sentencing determination are reviewed for clear error. MCR 2.613(C). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

First, defendant challenges the trial court's scoring of OV 10 at 10 points, reflecting that defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.50(1)(b). This Court has held that scoring OV 10 at 10 points was proper in a case where there was evidentiary support that the defendant assaulted the primary victim and there was a prior relationship between the defendant and that victim. *People v Wilson*, 252 Mich App 390, 395; 652 NW2d 488 (2002).

In this case, it was undisputed that the victim and defendant had a prior domestic relationship. The victim testified that she and defendant "had a four-year boyfriend-girlfriend relationship." She further testified that they lived together in Cassopolis, Michigan and Elkhart, Indiana. She indicated that the relationship ended in February 2005 after she asked defendant to move out of their apartment in Elkhart. Defendant corroborated the victim's testimony. The record also demonstrates that defendant showed up unannounced at a house he previously shared with the victim and assaulted her. The trial court's finding that a prior domestic relationship existed was not clearly erroneous, and we uphold the trial court's OV 10 scoring. The record supports the scoring. *Kegler*, *supra* at 190.

Second, defendant challenges the trial court's OV 13 score of 25 points. OV 13 is scored for a continuing pattern of criminal behavior. MCL 777.43. Twenty-five points are to be assessed if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). MCL 777.43(2)(a) provides that "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless whether the offense resulted in a conviction." "[I]n order for the sentencing offense to constitute a part of the pattern, it must be encompassed by the same five-year period as the other crimes constituting the pattern." *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006).

In this case, the only offenses within the applicable five-year period for scoring under OV 13 were the offenses that occurred on the day at issue. There were three felonious crimes against a person on that day. Defendant was sentenced for felonious assault and first-degree home invasion, both of which were crimes against a person. On the same day, defendant committed a second forced entry into the victim's house before being apprehended. This was a third crime against a person. OV 13 was properly scored. *All* crimes are counted for scoring under OV 13, not just convictions. MCL 777.43(2)(a).

Third, defendant challenges the trial court's scoring of PRV 7 at 20 points. MCL 777.57(1)(a) provides that a score of 20 should be assigned if the offender has "[two] or more subsequent or concurrent convictions." "PRV 7 . . . assesses points for subsequent or concurrent *felony* convictions." *People v Hendrick*, 261 Mich App 673, 683; 683 NW2d 218 (2004), rev'd in part on other grounds 472 Mich 555 (2005) (emphasis added); see also MCL 777.57(1). Defendant asserts that his conviction for willfully preventing a telephone communication cannot be used for PRV 7 scoring purposes, because there was insufficient evidence to sustain that

conviction. This assertion lacks merit. As discussed previously, there was ample evidence to sustain that conviction.

Defendant also contends that willfully preventing a telephone communication conviction should not be counted for PRV 7 purposes because it is a misdemeanor crime. We disagree with defendant's argument. A violation of former MCL 750.540 is "a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than 1,000 dollars." Nevertheless, MCL 761.1(g) provides that a felony "means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony."[4] Thus, two-year misdemeanors are considered as felonies for the purposes of habitual-offender, probation, and consecutive sentencing statutes. *People v Smith*, 423 Mich 427, 434, 439; 378 NW2d 384 (1985). For the purposes of sentencing, a violation of former MCL 750.540 is a felony, because it provides for a maximum imprisonment of two years. The record demonstrated that defendant had two concurrent convictions, for felonious assault and for willfully preventing a telephone communication; thus, the PRV 7 scoring will be upheld. *Kegler, supra* at 190.

Finally, defendant contends that defense counsel rendered ineffective assistance of counsel by failing to object to the trial court's sentencing, by failing to conduct an adequate pretrial investigation when he did not locate three defense witnesses, and by failing to question the prosecution's witnesses effectively. A determination of whether defendant was deprived of effective assistance of counsel presents this Court with a mixed question of constitutional law and fact. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews the trial court's factual findings for clear error and its constitutional rulings de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). If the claim for ineffective assistance of counsel is unpreserved, this Court's review is limited to errors apparent on the record. *Matuszak, supra* at 48.

To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; that, but for his counsel's errors, there is a reasonable probability that the results of the proceedings would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra* at 302. "This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Rodgers, supra* at 715. "Defense counsel is not required to make frivolous or meritless motions." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

[4] The Michigan Sentencing Guidelines Manual provides a substantially similar definition of a felony.

First, defendant claims that defense counsel rendered ineffective assistance of counsel by failing to object to the scoring of the sentencing guidelines. This argument lacks merit. As discussed previously, we conclude that the trial court's scoring of OV 10, OV 13, and PRV 7 was proper. Defendant's claim of ineffective assistance of counsel cannot be predicated on the failure to make a frivolous objection. *Id.* Any objection to the scoring would have been frivolous.

Second, defendant asserts that defense counsel failed to conduct an adequate pretrial investigation by not locating three witnesses. The failure to call a particular witness at trial is presumed to be a matter of trial strategy. *Avant, supra* at 508. We further note, in response to various arguments that defendant makes on appeal, that, generally, this Court's review is limited to the record of the trial court and no enlargement of the record on appeal is allowed.[5] *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000).

Defendant claims that two of the proposed witnesses would have testified that defendant did not kick in the victim's door or brandish a liquor bottle and that the third would have testified that "he never changed the locks on the door." Defendant's argument is self-serving and speculative. The victim and the victim's son testified regarding the time-frame of defendant's three separate visits to the victim's residence and also testified regarding who was present at the victim's residence during the incident from which the present convictions resulted; the three proposed witnesses in question were not mentioned as being present during the pertinent actions. Additionally, the police witnesses testified that only the victim and her son were present when they responded after defendant's first forced entry into the residence. The testimony simply fails to demonstrate that any of the proposed witnesses were even present for the altercation at issue. In addition, defendant does not explain how testimony from the third proposed witness that "he never changed the locks on the door" would have somehow affected the outcome of the case. On this record, we cannot find that defense counsel's failure to present the three proposed witnesses fell below an objective standard of reasonableness. Moreover, the record does not support that calling the witnesses could have, much less reasonably would have, affected the outcome of the trial. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). There has been no showing that defendant was denied effective assistance of counsel as a result of defense counsel's failure to locate or call the proposed witnesses. *Matuszak, supra* at 48.

Third, defendant contends that defense counsel failed to question the prosecution's witnesses effectively. "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which [this Court] will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (internal citation and quotation marks omitted). Defendant argues that defense counsel should have asked the prosecution witnesses "which people were in [the victim's] home" on the night in question and should also have asked questions about what was changed and repaired in the home after the incidents. Further, defendant asserts that defense

[5] This Court denied defendant's previously-filed motion for a remand.

counsel should have questioned the deputies about "why [they] failed to take a picture of the front door of [the victim's] home" or why the bottle was not preserved as evidence.

The record demonstrated that the parties and the trial court questioned the victim, as a rebuttal witness, about who was present at her residence during the various stages of the incident. Thus, counsel made the relevant inquiry. Moreover, defendant's assertions that defense counsel should have made certain inquiries to the police and should have inquired about the changes and repairs to the home calls for this Court to second-guess defense counsel with the benefit of hindsight. *Id*. In reviewing a claim of ineffective assistance of counsel, this Court will not substitute its judgment for that of counsel regarding trial strategy. *Rodgers*, *supra* at 715. Even if a strategy fails, it does not render counsel's assistance ineffective. See *id*. Defendant has failed to overcome the strong presumption that defense counsel's actions constituted sound trial strategy under the circumstances. *Matuszak*, *supra* at 58. Moreover, defendant has not demonstrated a reasonable probability that the outcome of the trial would have differed if counsel had asked the suggested questions. *Toma*, *supra* at 302-303.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter